

STATE OF MICHIGAN
COURT OF APPEALS

DOLORES KLEEKAMP, Personal Representative
of the Estate of ROSE ARGELINE,

UNPUBLISHED
June 15, 2004

Plaintiff-Appellee/Cross-Appellee,

v

No. 246984
Wayne Circuit Court
LC No. 01-120188-NM

TENDERCARE, INC., d/b/a WAYNE TOTAL
LIVING CENTER,

Defendant-Cross-Appellant,

and

GENERAL MEDICINE, P.C.,

Defendant-Appellant.

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

In this interlocutory appeal by leave granted, defendant General Medicine, P.C., challenges the trial court's decision granting its motion for summary disposition with regard to its vicarious liability for any malpractice committed by Dr. Gale, a physician certified by the American Board of Surgery, but denying the motion with regard to its vicarious liability for any malpractice committed by Drs. Sharabi, Ansari, and Reddy, who are each physicians certified in internal medicine. The dispositive issue concerns whether plaintiff's attorney reasonably believed that the affidavit of merit submitted with plaintiff's complaint complied with MCL 600.2912d(1). Plaintiff's affidavit of merit was signed by Dr. Irving Vinger, who was board certified in family practice, but not certified in surgery or internal medicine. Nonetheless, the trial court determined that plaintiff's attorney reasonably believed that Dr. Vinger qualified as an expert witness under MCL 600.2169 based on representations allegedly made by an unidentified employee of General Medicine to an assistant in plaintiff's counsel's office to the effect that each of the named physicians specialized in family medicine. We reverse in part and remand for further proceedings.

We review de novo a trial court's decision on a motion for summary disposition to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Regardless of whether we evaluate the

trial court's decision under MCR 2.116(C)(7) or MCR 2.116(C)(10), we conclude that the trial court erred in denying General Medicine's motion with respect to the alleged malpractice of Drs. Sharabi, Ansari, and Reddy. The evidence failed to establish that the requirements of MCL 600.2912d(1) were satisfied, because we find that plaintiff's attorney did not have a basis for reasonably believing that plaintiff's expert, Dr. Vinger, met the requirements for an expert witness under MCL 600.2169(1) relative to any of the named physicians. Thus, General Medicine's motion should have been granted in full with regard to this issue. *Geralds v Munson Healthcare*, 259 Mich App 225; 673 NW2d 792 (2003), lv pending.

Initially, we note that plaintiff's complaint named four physicians who allegedly committed medical malpractice, but only two of these physicians, Dr. Gale and Dr. Ansari, were alleged to be employed by General Medicine. When resolving General Medicine's motion for summary disposition, the trial court did not determine which physicians were employed by General Medicine, but rather focused on whether plaintiff's attorney reasonably believed that Dr. Vinger was qualified under MCL 600.2169 with respect to each of the four physicians. In light of our determination that plaintiff's affidavit of merit is deficient with respect to plaintiff's claims against each of the named physicians, we likewise find it unnecessary to resolve which of the four physicians were actually employed by General Medicine.

MCL 600.2912d(1) provides:

Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. . . .

And MCL 600.2169 provides, in pertinent part:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. *However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.* [Emphasis added.]

It is undisputed that Dr. Gale was board certified in the area of his specialty, surgery, and that the other three named physicians were board certified in the area of their specialty, internal medicine. It is also undisputed that plaintiff's expert, Dr. Vinger, who signed the affidavit of

merit, was not board certified in either surgery or internal medicine, but rather was offered by plaintiff as having expertise in family practice.¹ Nevertheless, under MCL 600.2912d(1), the affidavit of merit requirement may be satisfied as long as plaintiff's attorney reasonably believed that Dr. Vinger met the requirements for an expert witness under MCL 600.2169. Indeed, this Court has held that "[a]n affidavit is sufficient if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169." *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002).²

Here, plaintiff argues that because her attorney reasonably believed that the doctors were board certified in family practice, it was reasonable to believe that Dr. Vinger was qualified as an expert under MCL 600.2169. Plaintiff's attorney did not submit an affidavit explaining the basis for his belief regarding the four physicians named in the complaint. Instead, he submitted the affidavit of a legal assistant in his office, who averred that an unidentified person from General Medicine informed her during a telephone conversation that each of the four physicians specialized in "family medicine." Even accepting the truth of these averments, we conclude that this limited information was insufficient to enable plaintiff's attorney to form a reasonable belief concerning the board certification of any of the physicians. *Geralds*, *supra* at 233.

Although the issue in *Geralds* involved the plaintiff's counsel's belief regarding its expert witness' board certification, we find the case applicable here. The *Geralds* Court stated:

It is unreasonable for an attorney to form a belief regarding the board certification of a physician without asking the physician about his board certification. As skilled and experienced as plaintiff's attorneys appear to be, the failure to ask the four word question, "Are you board certified?" and the failure to examine [the affiant's] curriculum vitae, which contains no mention of board certification in emergency medicine, were not reasonable under the circumstances.

There being no evidence that plaintiff's attorney directly, or through a legal assistant, made a specific inquiry to an appropriate, knowledgeable individual about the physicians' certification and area of specialty, or consulted an appropriate information source, such as the American Medical Association, to determine whether the physicians were board certified in any area of specialty, we conclude that the trial court erred in determining that plaintiff's attorney had a basis for reasonably determining that Dr. Vinger met the requirements for an expert witness under

¹ In support of its motion, General Medicine submitted documentary evidence purporting to show that Dr. Vinger was board certified in family practice. Our review of the evidence fails to disclose that Dr. Vinger was board certified in any area. Nonetheless, because the parties do not dispute this issue, we will assume for purposes of our review that Dr. Vinger was board certified in family practice.

² We note that the issue whether an expert who does not possess the same board certification as the defendant physician is qualified under MCL 600.2169(1) to present expert testimony against the defendant physician is currently pending before our Supreme Court. *Halloran Estate v Bhan*, 468 Mich 868 (2003), and *Grossman v Brown*, 468 Mich 869 (2003).

MCL 600.2169.³ Accordingly, we reverse the trial court's decision on this issue with regard to plaintiff's claims involving alleged malpractice by Drs. Sharabi, Ansari, and Reddy, and remand for entry of an order granting General Medicine's motion for summary disposition as to plaintiff's malpractice claim involving these three above-named physicians.

We express no opinion whether plaintiff's action is therefore barred by the statute of limitations, as argued in General Medicine's motion for summary disposition, given the trial court's failure to expressly decide this issue and General Medicine's failure to brief it on appeal. Additionally, we decline to address the additional issues raised by defendant Tendercare, Inc., in its cross appeal. Because the trial court did not enter an order regarding plaintiff's claims against Tendercare, Inc., there is no order to review. "A court speaks through its orders, and the jurisdiction of this Court is confined to judgments and orders." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly

³ We find it curious that despite plaintiff presenting the same argument below, the trial court dismissed plaintiff's claim as to Dr. Gale because a general surgery board certification was not close to family practice, yet denied General Medicine's motion as to the other three physicians because it found that plaintiff's attorney "reasonably relied on a representation from the nursing home."